No. 20655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCAL 770, Affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF PETITIONER.

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ,
ROBERT M. DOHRMANN,
Suite 950,
6404 Wilshire Boulevard,
Los Angeles, Calif. 90048,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 20655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCAL 770, Affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF PETITIONER.

JURISDICTIONAL STATEMENT.

This is a Petition for Review of a Decision and Order of the National Labor Relations Board, issued December 17, 1965, dismissing a consolidated complaint filed by the General Counsel of the National Labor Relations Board on September 24, 1964. Petitioner herein filed charges and amended charges with the Regional Director of the Twenty-first Region of said Board between March 13 and September 18, 1964, which led to the issuance of the complaint. This Petition for Review is brought pursuant to Section 10(f) of the Labor Management Relations Act of 1947, as amended 1959. 29 U.S.C. Section 160(f), 48 Stat. 926, c. 426. Petitioner is aggrieved by the said Decision and Order in that it has, by dismissing the complaint in its entirety, denied in whole the relief sought by petitioner in its charges and amended charges and in the complaint which issued thereon.

STATEMENT OF THE CASE.

The following factual statement of the activities of the parties in the case before the National Labor Relations Board is taken, in its entirety, from the Reporter's Transcript of Testimony and exhibits presented to the Trial Examiner and specifically, where such testimony and/or exhibits were in conflict with other testimony and/or exhibits, this statement has been drawn exclusively from the testimony of those witnesses produced on behalf of the parties whose activities are described or from those findings of fact made by the Trial Examiner which were adopted by the National Labor Relations Board in its Decision and Order. [63]

For brevity, petitioner will hereinafter sometimes be referred to as "the Retail Clerks" or "Local 770", the National Labor Relations Board as "the Board," the respondent employers, the Boy's Markets, Inc., Von's Grocery Company, and Food Employers Council, Inc. as, respectively, "Boy's", "Von's" and "the Council." Intervenor Los Angeles Joint Executive Board of Hotel & Restaurant Employees & Bartenders Unions, AFL-CIO, will be referred to as the "Culinary Union."

The pleadings of the parties and the decisions of the Trial Examiner and of the Board are all contained in Volume I of the certified Transcript of Record before the Court. References herein to these materials will be to the Arabic-numbered page within the said Volume I. The Reporter's Transcript of Testimony received by the Trial Examiner will be found in Volumes II A, II B, and II C. The said Reporter's Transcript is paginated serially throughout these three volumes and citations to such testimony will be by arabic page number preceded by the letters "R.T.". References to the

exhibits admitted into evidence by the Trial Examiner will be according to the tables of exhibits found at Reporter's Transcript pages 3-4, 157 and 330, all of which have been designated by the petitioner for inclusion in the certified record before this Court.

A. Historical Background.

Boy's and Von's are California corporations having their principal offices in Southern California and both engaged in the operation of chains of retail stores and supermarkets in Los Angeles County, California. [30] The Council is a non-profit California corporation composed of employer-members engaged in the retail food market business in Southern California. Since its inception in 1941, the Council has bargained collectively for its members with labor unions in Southern California and has negotiated master collective bargaining agreements with those unions, including Local 770 of the Retail Clerks. Boy's, Von's and the Council are all engaged in business affecting commerce within the meaning of Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended 1959, 29 U.S.C. 152(6) and (7), 61 Stat. 137, C. 120, Title I, Section 101. [31] At all times material to this case, Boy's and Von's were, and are, members of the Council.

Since 1941, the Council has negotiated on behalf of its members collective bargaining agreements with Local 770. In recent times these contracts have been of five year duration. At the time of the events related below, such an agreement was in effect covering the period January 1, 1959, through March 31, 1964. This agreement covered work performed in the "retail food, bakery, candy and general merchandise industry." [31]

Over the years several members of the Council began merchandising prepared foods as described in the decision of the Trial Examiner:

> "In recent years, various supermarkets in the Los Angeles area have established in their stores counters which sell, at retail, food which is designed for consumption either at or soon after the time of purchase. In certain cases, the consumption of food takes place within the store itself or right outside the store in a patio area. In other cases the food is cooked or prepared at the counters and wrapped for customers who take it from the premises for consumption elsewhere. In either event, the food appears to be intended for consumption sooner than the other items sold at the supermarket.
>
> "The employers and union representatives who are involved in this controversy have established a certain parlance in describing the aforesaid operations. Thus, an operation which handles food for consumption on the premises of the supermarket is called a 'snack bar,' and operations which handles (sic) food for consumption off the premises of the supermarket is called a 'take-out food' operations (sic) or 'prepared food' operations (sic) and an operation which prepares both types of food is called a 'combination' operation." [31]

As these operations became prevalent in the retail food markets the unions involved, the Retail Clerks and the Culinary Workers discussed the functions of the work being performed in the contexts of their respective jurisdiction and organizational campaigns to represent the employees in the snack bars and prepared foods sections. [R.T. 303-304.] Both in terms of jurisdiction and of

the work within the Clerk's bargaining unit as defined in their labor agreements with the Council, the Clerks early arrived at the conclusion that those functions related to the preparation, maintenance and sales of food to be purchased and consumed off the premises of the market were both traditional functions performed by members of the Clerks and/or work described in the collective bargaining agreement. As a matter of union jurisdiction and as a matter of representation and the right to bargain collectively for such employees, the Clerks made this position known to, respectively, the Culinary Union and the employers. [R.T. 303-306.]

In January, 1963, the Clerks and the Council commenced bargaining sessions intended to lead to a new five-year contract when the current one would expire in March of the following year. In many of the 79 such sessions which occurred through and including March 14, 1964, proposals and counter-proposals were made regarding recognition of the Clerks as collective bargaining representatives of persons employed in prepared take-out food sections or combination food sections, their wages and fringe benefits. These negotiations and proposals are detailed by the Trial Examiner. [33-38] The ultimately concluded and executed labor agreement covering the period April 1, 1964, through March 31, 1969, at Article VI detailed wage rates for such operations. [38] This new agreement excluded from the purview of work performed by Retail Clerks "persons presently under a collective bargaining agreement with the Culinary Workers Union, or persons employed in a complete restaurant." [38] At this point in time Boy's operated snack bar/prepared food facilities in four of its markets. [99] Similarly, Von's operated such facilities in four of its stores. [43]

B. The Activities of the Boy's Markets, Inc.

At its Crenshaw market, Boy's operates a snack bar and take out food section. [R.T. 32-34, 76-77, 86.] This was a combined operation employing some eight persons. [39] In late 1963, the Clerks secured the signatures of five of these employees to authorization cards requesting that the Clerks represent them in collective bargaining. [39] Three officials of the Retail Clerks testified that they informed the personnel manager of Boy's that a majority of the employees in the snack bar of the Crenshaw store had signed authorization cards, that it was a combination operation being included in the current Clerks-Council contract negotiations and that the personnel manager promised them that she would honor no other claims of representation or requests to collectively bargain from another union, agreeing to await the outcome of the pending negotiations. [R.T. 138-144, 179-182, 308-309.] Mrs. Ida Freed, the Personnel Manager, in her testimony denied these allegations. However, the Trial Examiner expressly found that Mrs. Freed's testimony was not creditable, that it was not motivated by truthfulness, but by the interest of her employer, and that the testimony of the officials of the Retail Clerks was truthful and entitled to be given credence. [41] The Board, in its decision, has not reversed this finding.[1]

At all times mentioned the Culinary Union operated in Los Angeles according to self-imposed geographic

[1]The decision of the Board recites [64] that, when the Clerks asserted their representative claim, Boy's refused recognition "contending that the snack bar employees at all four of its stores should first be recognized." This finding is not supported by the record. Ida Freed testified that no representative claims were made [R.T. 230] and the officials of the Retail Clerks, as indicated above, testified that they received no such response.

jurisdictional limits which included only the Crenshaw store of the Boy's Markets. [R.T. 99.] In late 1963 a representative of that union secured authorization cards from many of the employees at the Crenshaw location purporting to have the same effect as those given to the Retail Clerks. The record does not reveal the exact number of such cards obtained by the Culinary Union but it does reflect that the five employees who signed cards for the Clerks also signed cards for the other union.

The Culinary Union made known to Mrs. Freed its claim of representation in the Crenshaw store and she responded to them that their claim of representation of a majority would not be considered for verification until Culinary could prove that it represented a majority of the snack bar employees in all four locations. [R.T. 99.] The Culinary Union complied with this request and in early January, 1964, submitted to a firm of certified public accountants the cards it had collected to be compared with a list of employees submitted to the accountants by Boy's. On January 14 the accounting firm reported to Boy's that 17 of the 21 employees working in the snack bar locations had executed valid authorization cards. [41-42] Sometime thereafter a five-year collective bargaining agreement containing a union security clause was executed between Boy's and the Culinary Union. If there were any negotiations between the company and the union in arriving at this collective bargaining agreement such negotiations were not made a part of this record. The employees at the Crenshaw store testified that they were not informed of the execution of the agreement until April 3, 1964, two months after the effective date. At the same time they

were informed of the union security clause which was the only clause of that contract ever explained to them in detail. [R.T. 37-42, 80-82, 88-89.] According to the testimony of Mrs. Freed, an unsigned collective bargaining agreement was sent to Boy's by the Culinary Union, was signed and returned to the union by the company without comment. [R.T. 226-227.] Despite the fact that Mrs. Freed knew her company was a member of the Food Employer's Council, that it was negotiating with the Retail Clerks and that these negotiations included discussions of the snack bar functions [R.T. 227-228] Mrs. Freed did not notify the Council of the execution of the culinary agreement until two months after it had been signed. [R.T. 333.]

C. The Activities of Von's Grocery Company, Inc.

As stated above, at the time that is material to this case, Von's had four of its retail markets furnishing snack bar and take out food services to its customers, generally in combination form. Respondent's Exhibits 1 and 2 [R.T. 161-162] constitute an exchange of correspondence between the Retail Clerks and the President of Von's in which the union made the claim that employees selling food for consumption off the market premises were performing work within the recognition and bargaining unit clauses of the 1959-1964 Retail Clerks-Council agreement and that both the wage and union security provisions of that agreement should apply to them. Von's replied that it disagreed with the union's contention. Shortly after this exchange of correspondence, the Clerk-Council negotiations for a successor agreement commenced. During the succeeding months numerous proposals and counter-proposals crossed the bargaining table between the Clerks and the

Council in which both parties sought to define the work activities which would be allocated to the Clerks in their new agreement and the wage rates to be paid for such work. These proposals are detailed in the decision of the Trial Examiner. [33-38]

A comparison of the first letter of the Retail Clerks to Von's [Resp. Ex. 1] dated November 23, 1962 [R.T. 161] and the language of the final Clerks-Council agreement of March 14, 1964, discloses that the union consistently sought to include within its bargaining unit work performed in handling foods to be consumed off the premises of the market, whether in a service delicatessen or in a combination facility. This position was, similarly, communicated to the Culinary Union in an attempt to settle jurisdictional lines.

However, settlement was not reached because the Culinary Union took the position "that if they sold any food for consumption on the premises—even a cup of coffee—that it was all going to be the Culinary's jurisdiction." [R.T. 304.]

While the Clerk-Council negotiations described above were continuing, and in January, 1964, the Culinary Union wrote to Kenneth Doyle, Von's Director of Industrial Relations and Personnel, claiming to represent a majority of the employees of Von's working in the snack bar and take out food facilities in the four Von's stores which had such services. Doyle referred the correspondence to the Council for handling [R.T. 168-180] and the Council referred it to its Labor Relations Associate, Melvin Dauber. [R.T. 335.] Mr. Dauber arranged to have the Culinary Union's proof of representation checked in the same manner as Boy's used, reported to Von's the results of this card check and ad-

vised Von's to enter into negotiations with the Culinary Union sometime shortly after January 22, 1964. [R.T. 335-336.] Thereafter, Von's executed a collective bargaining agreement containing a union security clause in February of 1964 "after . . . consulting and meeting and discussing the contract. . . ." [R.T. 170.]

Mr. Doyle testified that when he transmitted the demand of the Culinary Union for recognition to the Council that John Bacon was the first official there to deal with the matter. [R.T. 170.] Mr. Bacon was one of the negotiators in the Council-Clerks bargaining sessions. [R.T. 239, 399.] Mr. Bacon turned the matter over to Mr. Dauber (who appeared in the proceedings before the Board in this case for the Council). [R.T. 6.] Mr. Dauber testified that he did not participate in the Clerk Council negotiations [R.T. 334] that the Council kept its members informed of the progress in these negotiations [R.T. 344-345] but that he himself had not been kept apprised of these particular discussions with the Retail Clerks and therefore, did not know the various proposals and counter-proposals set forth above. [R.T. 345-346.]

D. The Proceedings in This Case.

The attorneys for the Retail Clerks, upon notification that Boy's and Von's had signed labor agreements with the Culinary Union, filed with the Regional Director for the Twenty-first Region of the Board, certain charges and amended charges [3-6] alleging that Boy's, Von's and the Food Employer's Council had violated Sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Labor Management Relations Act of 1947 as amended in 1959, 29 U.S.C. 158(a)1, 2 and 3 and that

the signing of such an agreement during a period in which another labor union, namely the Clerks, had presented to the employers a real question concerning representation of the employees involved, interfered with, restrained and/or coerced said employees in the exercise of their rights guaranteed to them under Section 7 of the Act, 29 U.S.C. 157, in violation of Section 8(a)(1); and provided illegal assistance to the Culinary Union in violation of Section 8(a)(2). It was also charged that the respondents enforced or attempted to enforce the union security provisions of the Culinary contract by threatening the discharge of employees for failure to join the Culinary Union, in violation of Section 8(a)(3).

After an investigation of these charges conducted by the Regional Director of the Twenty-first Region, a complaint was issued by him incorporating these allegations on September 24, 1964. [7-14] The case was heard before Trial Examiner Howard Myers on November 24-27, 1964, and he rendered his decision on June 18, 1965 [29-50], finding that respondents Boy's and Von's had violated Sections 8(a)(1) and 8(a)(2) of the Act in executing the agreements and that respondent Council had similarly violated the said Sections in advising and/or ratifying such execution while serving as the collective bargaining agent for the other respondents. The Trial Examiner did not find that the respondents, or any of them, had violated Section 8(a)(3) by maintaining or enforcing the union security provisions of the contracts. In this regard the evidence showed that only one employee of the Boy's Markets had complied with the clause by joining the Culinary Union and that that employee had paid only the sum

of $5.00. [R.T. 408-409.] While the General Counsel for the Board filed a cross-exception to the decision of the Trial Examiner for his failure to find on the 8(a)(3) violation, petitioner before this Court makes no argument concerning such violation since it must first be established that, as found by the Trial Examiner, the respondents illegally assisted the Culinary Union by granting it recognition and executing labor agreements with it, and since the amount of damages suffered by any of the employees is *de minimis*.

STATUTES INVOLVED.

The Labor Management Relations Act of 1947, as Amended by Public Law 86-257, 1959, Provides in Pertinent Part as Follows:

A. SECTION 7 (29 U.S.C. Section 157) PROVIDES:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) (Section 158(a)(3)) of this title.

B. SECTION 8(a) (29 U.S.C. Section 158(a)) PROVIDES IN RELEVANT PART:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;

Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;"

SPECIFICATION OF ERRORS RELIED ON.

1. The National Labor Relations Board erred in finding, upon the facts of this case that no real or colorable claim of representation had been presented to the respondents by the Retail Clerks Union.

2. The National Labor Relations Board exceeded its authority and abused its discretion in finding that petitioner's claim for recognition by the Food Employer's Council was unsupportable in the face of unrebutted evidence to the contrary.

3. The National Labor Relations Board exceeded its authority and abused its discretion in finding that the Food Employer's Council was not authorized by the Boy's Markets, Inc. and Von's Grocery Company to bargain with petitioner on their behalf, in the face of unrebutted evidence to the contrary.

4. The National Labor Relations Board exceeded its authority and abused its discretion in holding that petitioner's claim to represent certain employees was a part of another and larger claim of representation involving other, distinct employees.

5. The National Labor Relations Board exceeded its authority and abused its discretion in failing to apply its doctrine established in *Mid-West Piping,* 63 N.L.R.B. 1060, to the facts of the instant case.

QUESTIONS PRESENTED.

1. Did the Retail Clerks present to the respondents a genuine question concerning representation?

2. Was the Food Employer's Council authorized by its members, Boy's and Von's to represent them in bargaining for their snack bar and take out foods employees?

3. Did the Retail Clerks present to the respondents a genuine question concerning representation of the employees of Boy's Markets' Crenshaw store alone?

4. Should the Board have required that, before these respondents deal with either labor organization, an election be held among the affected employees pursuant to Section 9 of the Labor Management Relations Act?

SUMMARY OF ARGUMENT.

The National Labor Relations Board, in pursuance of its obligations to prevent the illegal assistance of one union over another by an employer, has, consistently since 1945, ruled that where two such unions have submitted to the employer a real claim of representation of the employees, such employer is not free to decide which to recognize and bargain with, but rather must maintain a strict neutrality as to the competing unions, unless and until one of them shall have been certified as the collective bargaining representative by the Board after a secret ballot election.

In the instant case two such real claims of representation were presented to the employers who chose to recognize and bargain with one of the unions without requiring its certification, despite the fact that the collective bargaining agent of the employers was, during the same period of time, purporting to grant recognition to, and to bargain with, the other union.

Petitioner here asked the Board below to apply its *Mid-west Piping* rule, quoted *supra,* to give the employees affected an opportunity to cast a secret vote whether they wish to be represented by either of the competing unions, or by no union. The Board has refused to apply the rule and has validated a five year collective bargaining agreement containing a compulsory union membership clause without these employees having had the opportunity to be heard at all. The Board has done so under the guise of deciding that petitioner, one of the competing unions, made no "real" or "colorable" claim to represent these employees despite clear evidence to the contrary.

Unless the Board is directed to apply its *Mid-west Piping* doctrine a grave injustice shall have been done these employees and their rights to self-organization and to form, join or bargain collectively through a union of their own choosing, guaranteed to them under the Labor Management Relations Act, shall have been denied.

ARGUMENT.

I.

The Retail Clerks Presented a Real Question Concerning Representation of the Employees of Von's and Boy's.

The General Counsel in his case before the Trial Examiner, indicated that the remedy he was seeking was that called for by the Board's decision in *Midwest Piping and Supply Company, Inc.*, 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945). In that decision the Board held that where an employer is faced with two real and conflicting claims of representation of his employees by different labor unions, he is not free to arrogate to himself the decision of which union he shall recognize and bargain with. The Board held that:

> "Under such circumstances, the Congress has clothed the Board with the exclusive power to investigate and determine representatives for purposes of collective bargaining. In the exercise of this power, the Board usually makes such determinations after a proper hearing and at a proper time by permitting the employees freely to select their bargaining representatives by secret ballot." (63 N.L.R.B. at page 1070.)

The remedy prescribed for the violation of this rule is an order of the Board requiring that the employer cease and desist from recognizing or bargaining with, or maintaining or enforcing any labor agreement with, the union which it has illegally assisted unless and until such union is certified as the bargaining representative of the employees by the National Labor Relations Board pursuant to Section 9 of the Act.

One reason for the *Mid-west Piping* rule is set forth by the Board in a later decision, *Sunbeam Corporation,* 99 N.L.R.B. 546, 30 L.R.R.M. 1094 (1952):

> "This Board has also long recognized that authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract where competing unions are soliciting cards, because of the duplications which then occur." (99 N.L.R.B. at 550-551.)

While two early decisions of the Courts of Appeal for the Fourth and the Sixth Circuit have failed to apply the *Mid-west Piping* rule, *N.L.R.B. v. Corning Glass Works,* 204 F. 2d 422, 32 L.R.R.M. 2136 (C.A. 1, 1953) and *N.L.R.B. v. Indianapolis Newspapers, Inc.,* 210 F. 2d 501, 33 L.R.R.M. 2536 (C.A. 6, 1954), the doctrine is now accepted by the Courts of Appeal. See *e.g., N.L.R.B. v. National Container Corporation,* 211 F. 2d 525, 33 L.R.R.M. 2651 (C.A. 2d, 1954); *St. Louis Independent Packing Company v. N.L.R.B.,* 291 F. 2d 700, 48 L.R.R.M. 2469 (C.A. 7, 1961). The obligation of the employer is defined in the latter case as one of "neutrality once a real question of representation arose." (291 F. 2d at page 704.)

The principle has been considered with approval by this Court in *N.L.R.B. v. Knickerbocker Plastic Company,* 218 F. 2d 917, 35 L.R.R.M. 2420 (C.A. 9, 1955).

An essential element, as correctly stated by the Board in its decision below, is that there must be two or more "genuine," "real" or "colorable" claims of representation made. In its decision in the instant case, the Board indicated its opinion that the Clerk's claim was "clearly unsupportable and not cognizable as a colorable claim." [66] Because this finding of fact if properly sustained,

prevents the application of the *Mid-west Piping* doctrine, the central and most crucial issue upon this petition for review is whether or not the evidence presented to the Trial Examiner and before this Court can sustain such findings. As provided in Section 10(c) of the Act, 29 U.S.C. 160(c), if the opinion of the Board is sustained by the "preponderance of the testimony" it shall have been entitled to dismiss the complaint as it did here.

A. The Authorization Cards Secured by the Retail Clerks.

The decision of the Board states that the Clerks secured authorization cards from the employees of the Boy's Crenshaw store, but did not secure them from any other employees of either employer. The question thus presented here is whether or not a "real" or "colorable" claim of representation must be accompanied by the obtaining of such cards from a majority of the employees affected.

The Board characterizes the claims of the Clerks made to these two employers as resting "essentially on (the Clerk's) multiemployer contract with the Council," [66] and the Board further finds that this contract did not cover "snack bar employees" in light of its decision in 1963 in *Piggly-Wiggly Company*, 144 N.L.R.B. 708, 54 L.R.R.M. 1119.

As to the first contention that the Clerks did not secure authorization cards it is established Board precedent that such a showing of interest may be based, not necessarily upon cards evincing employee interest, but also upon the pre-existing multiemployer contract. See *W. Horace Williams Company*, 130 N.L.R.B. 223, 47

L.R.R.M. 1337 (1961); *Pacific Tankers, Inc.*, 81 N.L.R.B. 325, 23 L.R.R.M. 1361 (1949).

In answer to the second contention, that the Clerks-Council contract was expressly determined by the Board not to cover "snack bar employees" petitioners respectfully direct the attention of the Court to the Board's decision in the *Piggly-Wiggly* case, *supra*. The facility in operation there was described in the opinion as follows:

> "The snack bar prepares food for on-premises consumption. It is located in front of the checkstands, at the front of the store. (Footnote omitted) It consists of an inside counter, where food is prepared and served and an adjacent outside patio for table service during clement weather. All purchases made at the snack bar are paid for there . . ."
>
> * * *
>
> "The snack bar employees currently consist of a fry cook and seven waitresses . . . the fry cook prepares food and occassionally waits on customers. The waitresses assist the fry cook and wait on customers. No other employees in the store perform this type of work." (144 N.L.R.B. at 710-711.)

It should be noted that the *Piggly-Wiggly* decision arose on a representation petition under Section 9(c) of the Act, 29 U.S.C. 159(c), filed by the Culinary Union. Petitioners here were permitted by the Board to intervene in that case, their showing of interest consisting of the 1959-1964 Clerks-Council contract and "upon the basis of independent evidence of a showing of interest in the unit sought." (144 N.L.R.B. at 709, Footnote 2.) Upon the evidence before it, as set forth

above, the Board found that the old Clerks-Council contract did not cover the employees working in such a pure snack bar. The Board further found that while the Piggly-Wiggly Company operated snack bars in two of its stores, nevertheless, the appropriate unit in which to conduct an election was the snack bar employees within each store and an election was directed between the Clerks and the Culinary Union. (144 N.L.R.B. at 712.)

The Board did not have before it in that case the more complicated question presented here: the operations of Von's and Boy's which combine the preparation and sale of food in part for in-store consumption and in part for home or outside consumption. Furthermore, it is not at all clear that the *Piggly-Wiggly* decision would be followed in this case inasmuch as the finding of a separate store unit was based upon a presumption in the following language at 144 N.L.R.B. at 710:

> "In *Joseph E. Seagram & Sons, Inc.* (101 N.L.R.B. 101) the Board set forth its policy, which it has since followed, [Footnote omitted] that an established multiemployer or multiplant bargaining pattern as to certain categories of employees is not controlling with respect to other categories of employees as to whom there is no bargaining history, and separate, single employer or single plant units of the unrepresented employees are presumptively appropriate. Also, where, as here, *no unions seek to represent the unrepresented employees on a broader basis,*[8] and there is no multiemployer bargaining pattern for such employees, the Board will find a separate unit of employees in a single plant appropriate. [Footnote omitted] (Emphasis added.) * * *

"[8]It is noted that the intervenor has made no showing in, nor does it seek to represent a broader snack bar unit. It merely asserts that the petition should be dismissed because it does not seek a broader unit."

The contention of the Board in this case, that the Clerk's claim of representation is not "colorable" because it secured authorization cards in only one store, by its own reasoning does not square with the *Piggly-Wiggly* decision in which it found such a single location to be an appropriate one for election and bargaining even though there existed more than one such unit within the same company. By a parity of reasoning between the two cases, the Board should have found in the instant decision that a valid claim for representation had been made within a presumptively appropriate single plant unit. Further, the Board should have considered, upon the record before it, whether the different operations of Boy's and Von's from those of *Piggly-Wiggly*, raised a multi-plant unit question, the determination of which the employer may not arrogate to itself under the *Mid-west Piping* doctrine.

But the major distinction between this case and *Piggly-Wiggly* is the simple fact that the contract relied upon in part by the Clerks in *Piggly-Wiggly* is not the same contract relied upon here. The *Piggly-Wiggly* decision, was rendered September 19, 1963, and referred to the Clerks "current contract." (144 N.L.R.B. at 709.) The contract which was negotiated between the Clerks and the Council and signed March 14, 1964, unlike the prior agreement contains a grant of recognition by the employer to the union covering work performed within food markets generally subject to the

relevant exclusion of persons "presently under a collective bargaining agreement with the Culinary Workers Union . . ." and also contains specific provisions as to wage rates which will apply depending upon the type of snack bar and prepared foods operation in the store. [38] By contrast the previous Clerks-Council agreement covered "grocery and produce department work" only. (144 N.L.R.B. at 709.)

B. Did Boy's and Von's Authorize the Council to Represent Them in Bargaining for Such Employees?

The Board held that "it does not affirmatively appear" from the record that such was the case. [66] Petitioners respectfully contend that the Board erred in this determination and that the record clearly indicates such representation in the following ways:

1. The Boy's Markets, Inc.

Lois McKinstry, Executive Administrator of Local 770 of the Retail Clerks, testified to a conversation she had with Ida Freed, Personnel Manager of Boy's, as follows:

> "To the best of my recollection, I said that we could present the proof of representation or the authorization cards; however, we were in negotiations. And she agreed that, while the Culinary had contacted the people, there would be no contract signed since we were in negotiations and her company was being represented by the Food Employer's Council." [R.T. 309.]

Melvin Dauber, Labor Relations Associate of the Food Employer's Council, represented Boy's and Von's

in the proceedings before the Board, announcing his appearance as follows:

> "Mr. Dauber: appearing for Food Employer's Council, Von's Grocery Company, The Boy's Markets, the Food Employer's Council, Inc. by Melvin Dauber, 2599 South Flower, Los Angeles 7." [R. T. 6.]

Mr. Dauber, called as a witness by the General Counsel, testified that the President of the Boy's Markets and the Executive Vice President of Von's were most probably reported to on a regular basis by the President of the Council, Robert K. Fox, as to the status of negotiations with the Clerks. [R.T. 344-346.]

Ida Freed, Personnel Manager of Boy's, testified that the Food Employer's Council, as agent for the Boy's Markets, negotiated contracts on behalf of Boy's and that she was aware of the continuing negotiations between the Council and the Clerks occurring in 1964. [R.T. 227-228.]

The existence of this authorization and agency, in addition to the evidence presented was admitted by the parties. Counsel for the Culinary Union propounded the following questions to a witness testifying on behalf of the Clerks:

> "Do you know whether Local 770 was asking the Food Employer's Council, as the agent of all these markets, including Boy's, to recognize it as the collective bargaining representative for all employees other than those covered by the Meat Cutters Union who worked within the four corners of the store?" [R.T. 144-145.]

2. Von's Grocery Company.

In addition to the fact that Von's was represented in the proceeding below by the Food Employer's Council [R.T. 6, *supra*] and that the evidence submitted on its behalf was defined by Mr. Dauber as, for example, "respondent Food Employer's and Von's No. 1," [R.T. 161] Robert J. Whittaker, Personnel Assistant for Von's [R.T. 102], testified that "in most of these matters we are represented by the Food Employer's Council." [R.T. 119.]

Kenneth L. Doyle, Director of Industrial Relations and Personnel for Von's [R.T. 160] testified that Von's had, in existence, at all times material, labor agreements with the Culinary Union covering some of its operations, and that when he received Culinary's demand for recognition in the Crenshaw store, he referred it to the Food Employer's Council. [R.T. 167-168.]

The following exchange took place between the witness, Mr. Doyle, and the Assistant General Counsel:

> "Q. (By Mr. Evans): And did Von's execute a Culinary agreement in February 1964 as a result of advice given by the Food Employer's Council?
>
> A. After our consulting and meeting and discussing the contract, yes." [R.T. 170.]

Additionally, Mr. Doyle testified that it was the Council and not the company which conducted the card check leading up to the advice of the Council that Von's recognize and bargain with the Culinary Union. [R.T. 168-169.]

The Clerks-Council agreement executed on March 14, 1964, which was the culimination of 15 months of nego-

tiations contained a specific agency clause in Article XIV, B:

"* * *

3. *Food Employers Council, Inc.* The Union hereby recognizes the Food Employer's Council, Inc. as the authorized representative of its members in matters pertaining to the negotiation and administration of this Agreement. In the event of a dispute, it shall be the duty of the Employer to notify the Food Employers Council, Inc. of the existing dispute if said Employer desires said Food Employers Council, Inc. to represent it in the dispute. Should a grievance or dispute be settled between the Union and any Employer signatory to this Agreement without the participation of the Food Employers Council, Inc. and if in such settlement, an interpretation of any language or phrase of this Agreement is involved in order that such settlement be reached, the Union shall, within ten (10) days of such settlement notify Food Employers Council, Inc., in writing of the dispute, the language or the phrase interpreted, the settlement reached, and the date of such settlement. Should the Union fail to notify the Food Employers Council, Inc., as set forth above, the fact of settlement and the interpretation of the language or phrase of the Agreement involved in the settlement shall not be used in evidence for any purpose whatsoever. No such settlement or interpretation shall be binding upon the Food Employers Council, Inc. or its members unless the Council or its members thereof participated in arriving at such settlement or interpretation."

For these reasons, it is the petitioner's contention that the record amply demonstrates a complete delegation of the duty of collective bargaining from these respondent employers as principals to the Food Employer's Council as agent and these employers looked to the Council for bargaining, advice, and contract administration with the Clerks, the Culinary Union, the Teamsters, the Meat Cutters, and any other unions that might claim representation of their employees.

In addition, Volume I of the certified Transcript before this Court contains correspondence from Mr. Dauber, dated November 2, 1964, in which he set forth his request for a continuance of the hearing before the Trial Examiner upon the ground that, as "the authorized representative for respondents Boy's Markets and Von's Grocery Company, we have requested this postponement because of critical negotiations with Southern California Retail Meat Cutters Unions." [21-22] This request is reiterated in a telegram appearing at pages 24 and 25 and in a letter, dated November 21, 1964, in which the additional allegation is made that Mrs. Ida Freed of Boy's Markets was "a member of the the (sic) industry negotiating committee in these critical meat cutter's negotiations." [26-27]

Finally, the General Counsel's complaint alleged that Boy's and Von's were, at all times material, members of the Council. (9, Par. 2[e].) Neither the answer of the Culinary union (15-16) nor that of the Council, Boy's and Von's [19-20] admit or deny these allegations. Pursuant to the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, Section 102.20, the allegations in the complaint are deemed admitted. The answer submitted on behalf of

the council, Boy's and Von's is signed by Mr. Dauber on behalf of the Council, by the Secretary-Treasurer of the Boy's Markets and by the Senior Vice President of Von's Grocery Company. [20]

This question of the status of the Council as agent for Von's and Boy's in the Clerk negotiations should have been determined by the board pursuant to Section 2 [13] of the National Labor Relations Act, 29 U.S.C. 152 [13] which provides as follows:

> "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

II.

The Council-Clerks Labor Agreement Did Not Expressly Exclude the Snack Bar Employees of Boy's and Von's.

The reverse of this contention was found to be a fact by the Board in its decision. [66] While this finding by the Board is not otherwise explained in its decision the only relevant exclusion in the agreement to which the Board could be referring is that found in Article I B, Section 3:

> "Persons presently under a collective bargaining agreement with the Culinary Workers Union . . ." [38]

If this is the exclusion to which the Board refers in its decision, petitioner submits that the term "persons presently under a collective bargaining agreement . . ." was never intended by the parties to the negotiations to have such effect at all.

In January of 1964, after tentative agreements on proposals regarding these snack bar and prepared foods employees, the chief negotiator for the union said to his counterpart of the Council, "Now, don't go out and sign up all the unsigned snack bars of the Culinary Workers while we're here talking about conditions for them." Mr. Fox responded that the union need not worry about that. [R.T. 281.]

Joseph M. McLaughlin, Attorney for the Food Employers Council, and a frequent participant in the Clerks-Council negotiations, testified on this point as follows:

> "Q. . . . On March 14, 1964—or between March 9 and March 14, 1964, was there any discussion over the word 'presently'?
>
> A. Not to my knowledge, with the exception that we had a discussion concerning certain concessionaires, but not in the context of the meaning of the word 'presently.' [R.T. 390.]
>
> * * *
>
> Q. . . . You've already testified that there was no discussion regarding the term 'presently' as far as the dates March 9 through March 14 are concerned. Is it your same testimony that there was no discussion regarding the effective date of the contract and 'presently' as it is in this Culinary Workers article?
>
> A. I didn't mean to testify that there was no discussion on a particular date, Mr. Dauber, because I don't remember that on March 14 there was a particular act or there wasn't. I can say—and this is in answer to your question—that there was, to my knowledge, no discussion at any time in these negotiations with respect to the meaning of the

word 'presently' as it is found in this Paragraph 3, although—let me say this: this was negotiated language; all these words were worked on and they were all put in, but there was no big discussion as to what 'presently' meant." [R.T. 393.]

To now find that this clause was negotiated for the purpose of excluding the very work functions and employees that had been discussed at the bargaining table for over a period of a year is clearly not supported by the record received by the Trial Examiner.[2]

III.

The Clerks Asserted a Valid Claim of Representation in the Boy's Crenshaw Store Which Was Supported by a Showing of Interest Independent of the Multiemployer Labor Agreement.

The decision of the Board dismisses the existence of the separate and distinct claim of the Clerks to represent the Crenshaw employees of Boy's which representation was supported by the testimony of the employees who signed authorization cards and wished the Clerks to represent them. [R.T. 17-22-23, 29-30, 78-79, 87.] The Board finds [66] that such claim must be "viewed in the light of the Clerks' admittedly larger and encompassing claim to represent all the snack bar employees on a multiemployer basis." [66] The finding is made that "the lesser claim was part of the larger claim," that the Clerks did not assert it as a separate independent claim, "and that Boy's so understood." [66]

---

[2]The finding of the Board on this fact, as well as others throughout the decision, is subject to the criticism of the Court in that it cannot be determined upon what evidence such finding is based. *Retail Store Employees Union v. NLRB*, 350 F. 2d 791, 59 LRRM 2763 (C.A.D.C., 1965).

It is true that the Clerks' major emphasis in their claim of representation and demand for recognition was based upon their multiemployer labor agreements covering most of the functions in the retail stores. However, the vice of the Board's argument is that it requires the Clerks to stand or fall upon one of two alternative theories to support their claims. As pointed out above, the question of the extensiveness of the appropriate unit for collective bargaining is to be decided by the Board itself and not by the parties. Section 9(b) of the Act, 29 U.S.C. 159(b) provides in relevant part that:

> "The Board shall decide in each case whether, in order to assure to the employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ."

An excellent example of such a determination by the Board is its *Piggly-Wiggly* decision, 144 N.L.R.B. 708, cited *supra*. As noted above, the Clerks based their claim of representation of the employees involved upon the same dual grounds which are presented in the instant case; a multi-employer agreement and an independent showing of interest in a single facility. The Board in that case found that the old Clerks-Council agreement did not constitute an adequate showing of interest because the contract contained "no provision for a snack bar department as such or for the categories of employees working therein." (144 N.L.R.B. at 710.) Nevertheless, the independent showing of interest in the single plant unit was sufficient to place the Clerks on the ballot with the Culinary Union in the election

which the Board directed to take place in the single-store unit.

There is clearly a disparity between the *Piggly-Wiggly* decision and the instant one. Nor can this disparity be explained by a distinction in the proceedings involved. While the *Piggly-Wiggly* decision resulted from a representation case and was brought pursuant to Section 9 of the Act and this case arose upon allegations of the commission of unfair labor practices pursuant to Sections 8 and 10 of the Act, nevertheless, there is a close parallel between the two cases in the relief sought. Thus, in the representation proceedings, both unions sought to be placed on the ballot before the Board-conducted election. In this case one of the two unions seeks an order of the Board compelling the respondent employers to cease recognizing the other union and bargaining with it unless and until both shall have been placed upon a similar ballot for such an election.

The Board has found [66] that "the Clerks did not assert the lesser claim as a separate independent claim." However, the record shows that the representatives of the Clerks secured the cards, informed the personnel manager of Boy's, and asked her not to recognize or bargain with anyone else. [R.T. 180.] The personnel manager did not, as the Board found, refuse recognition at this point "contending that the snack bar employees at all four of its stores should first be recognized" [64] but rather made this contention to the representative of the Culinary Union, Mr. Meister, who testified:

> ". . . When this Boy's Market thing came up, it was necessary for us to encompass—the employer

> wanted all the stores included, . . . the employer insisted that they would not take an individual store, so it became necessary to get pledge cards from other stores . . . but there is only one store in our jurisdiction, and that is the one on Crenshaw." [R.T. 99.]

It thus appears from the record that the employer and the Culinary Union agreed upon a multi-store unit and, if so, the reasoning used by the Board in its decision below should serve to defeat that claim as well as the Clerks' major contention that a multi-store unit was appropriate.

That these two unions should compete in an election where the Board finds the appropriate unit to be within a single store, despite the claims or alternative claims as to unit raised by these unions, has been established by the Board in at least two other cases besides *Piggly-Wiggly*. See *e.g. Bab-Raud Company*, 147 N.L.R.B. 247 56 L.R.R.M. 1217 (1964) and *Esgro Anaheim, Inc.*, 150 N.L.R.B. 2, 58 L.R.R.M. 1056 (1964). In the former case the Clerks and the Culinary Union were competing for recognition and collective bargaining. In both cases the issue was whether or not a unit of the employer's operations throughout a geographic area or each operation individually was appropriate. In both the Board held the latter and in both elections were conducted within each separate unit.

Conclusion.

For the foregoing reasons, petitioner respectfully submits that the National Labor Relations Board has failed to apply the doctrine of the *Mid-west Piping* case and has failed to order that the respondent employers be-

fore it withhold recognition and bargaining from the Culinary Union, until the employees themselves might have the opportunity in a secret ballot election to determine this issue of crucial importance to them.

For this reason and to implement the policies contained in the Labor Management Relations Act, petitioner asks that this Court reverse the Order of the Board dismissing the complaint and that the Court direct the Board to issue an order pursuant to the *Midwest Piping* doctrine.

Dated: May 19, 1966.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ,
ROBERT M. DOHRMANN,
By KENNETH M. SCHWARTZ,
Attorneys for Petitioner.

> wanted all the stores included. . . . the employe insisted that they would not take an individua store, so it became necessary to get pledge card from other stores . . . but there is only one stor in our jurisdiction, and that is the one on Cren shaw." [R.T. 99.]

It thus appears from the record that the employe and the Culinary Union agreed upon a multi-store uni and, if so, the reasoning used by the Board in its de cision below should serve to defeat that claim as wel as the Clerks' major contention that a multi-store uni was appropriate.

That these two unions should compete in an electior where the Board finds the appropriate unit to be withi a single store, despite the claims or alternative claim as to unit raised by these unions, has been establishe by the Board in at least two other cases besides *Piggly Wiggly*. See *e.g. Bab-Rand Company*, 147 N.L.R.B. 24 56 L.R.R.M. 1217 (1964) and *Esgro Anaheim, Inc.* 150 N.L.R.B. 2, 58 L.R.R.M. 1056 (1964). In th former case the Clerks and the Culinary Union wer competing for recognition and collective bargaining. I both cases the issue was whether or not a unit of th employer's operations throughout a geographic area o each operation individually was appropriate. In both th Board held the latter and in both elections were con ducted within each separate unit.

Conclusion.

For the foregoing reasons, petitioner respectfully sub mits that the National Labor Relations Board has faile to apply the doctrine of the *Mid-west Piping* case an has failed to order that the respondent employers be

fore it withhold recognition and bargaining from the Culinary Union, until the employees themselves might have the opportunity in a secret ballot election to determine this issue of crucial importance to them.

For this reason and to implement the policies contained in the Labor Management Relations Act, petitioner asks that this Court reverse the Order of the Board dismissing the complaint and that the Court direct the Board to issue an order pursuant to the *Midwest Piping* doctrine.

Dated: May 19, 1966.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ.
KENNETH M. SCHWARTZ.
ROBERT M. DOHRMANN.
By KENNETH M. SCHWARTZ.
Attorneys for Petitioner.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT M. DOHRMANN